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In the

Supreme Court of the United States

October Term, 1965

Nos. 318, 323 and 499

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAHUHUA AEA, *et al.,* *Appellants,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

BERT T. KOBAYASHI
Attorney General
State of Hawaii

BERTRAM T. KANBARA
NOBUKI KAMIDA
Deputy Attorneys General
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

THURMAN ARNOLD
DENNIS G. LYONS
JOHN T. BIGBY
BROOKHART ELIZABETH LANDAU
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for John A. Burns, Governor of the State of Hawaii

Of Counsel:
ARNOLD & PORTER
Washington, D. C.

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In this reply brief we shall briefly touch on some of the more important respects in which the briefs filed on behalf of certain of the Hawaii State Senators (Abe, *et al.*),[1] certain of the State Representatives (Cravalho, *et al.*),[2] Lieutenant Governor Richardson,[3] and the original plaintiffs in this action[4] do not meet certain of the basic points which we urged in our opening brief.

I. THE ERRORS OF THE DISTRICT COURT

A. The District Court Erred in Affirmatively Holding That the Remaining Provisions of Article III Were "Constitutional and Valid" Despite the Presence of the Unconstitutional Provisions Fixing the Number of Senators Per District.

1. It is important here to remember the exact nature of the District Court's action of which we complain. In its opinion and order of February 17, 1965, the District Court affirmatively held that, despite the unconstitutional provisions of Article III, Section 2, fixing the number of Senators per Senatorial District, the other provisions of Article III were "constitutional and valid." (R. 79-80; 238 F.Supp., at 478-79)—Thus, the question is not, as the Cravalho brief suggests, whether it was proper for the District Court to express its views on certain of the substantive provisions of the Hawaii apportionment scheme after it had held a material portion of that scheme invalid. (Cr. Br. 48-49) We take no issue with this as a matter of principle, al-

[1] Cited "Abe Br."

[2] Cited "Cr. Br."

[3] Cited "Ric. Br."

[4] Cited "Pl. Br."

though we believe that some of the views which the District Court expressed were erroneous, and that in general a District Court should forbear from *any* action that will practically narrow the range of constitutionally permissible alternatives available to the formulation of an effective reapportionment plan.[5]

The point is, rather, that the District Court went beyond simply stating its views as to the constitutionality of various features of the apportionment scheme in Hawaii. It undertook, instead, to make an affirmative declaration that the remainder of the Article dealing with the composition of the Legislature was "constitutional and valid." This is, as we demonstrated in our opening brief, pp. 30-31, in flat conflict with this Court's decisions. Among other vices is the substantial degree of inflexibility this action introduced into any attempt to cure the defects which had been found in the State's apportionment scheme.

A vivid demonstration of how this in fact worked in the case of the Legislature's attempts to reapportion the Senate is furnished by the Abe brief itself. (Abe Br. 43-46) Thus, the Abe brief makes it clear—as indeed we have urged[6]—that the determinative factors in the Legislature's Senate reapportionment plan of April, 1965, rejected by the District Court, were the very provisions of the existing

[5] Indeed, despite the fact that we contend that there is no basis for affirmatively upholding any portion of the State's apportionment scheme at this juncture, we have, of course, urged from the District Court and, on appeal, from this Court, expressions as to the constitutionality of certain of the features of the existing scheme, like its use of the "registered voters" measure, and the peculiar combination of single and multimember districting that is used in the Hawaii House and which was used in the proposed Senate plan.

[6] Opening Br., pp. 39-40.

apportionment scheme which the District Court had affirmatively upheld. Thus, that brief attempts to justify the choice of multimember districts for the Senate on the basis that the use of single-member districts would have created Senate Districts smaller than the House Districts, which was contrary to the particular purposes of bicameralism in Hawaii. (Abe Br. 43) But this, of course, is so only because the apportionment plan in the House—which the Legislature took as a "given" factor in the situation—itself made extensive use of multimember districts.

Likewise, the Legislature's insistence on using the 25-member figure for the number of Senators—a detail of the pre-existing apportionment scheme also affirmatively upheld by the District Court—shaped the course of the plan that was proposed in April 1965; for it meant that single-member districts in the Senate would be smaller than the House multimember districts. Indeed, the very attempt of the Abe brief to use the 25-member starting point as a justification for the Senate plan demonstrates the inseverability of the matters which the District Court held to be severable. Thus the Abe brief states (Abe Br. 46): "The Hawaii Legislature accepted the 25-member figure of the Senate as its starting point. This acceptance was in itself a judgmental decision." The brief neglects to say that it was a starting point which the District Court, in effect, had mandated, and one which, at least in terms of a provisional plan, it could accordingly be said the Legislature had no power to change, under the form of the District Court's order.

2. The appellees in No. 318 attempt two other justifications for the District Court's affirmative decree declaring the various details of Article III "constitutional and valid."

First, they suggest that, since various of the elements of the apportionment scheme are arguably inoffensive when taken in themselves, they must also be constitutionally inoffensive when taken in the aggregate. (Abe Br. 89-95) But this misses the point. For example, our argument is not that there is anything intrinsically wrong with having 25 State Senators; but that, if this leads to an apportionment which uses an arbitrary multimember districting system, compounding the representational problems in the House of Representatives, it is part and parcel of a plan as unconstitutional as the original Senate apportionment system; and that in any event it is a factor which should not be inflexibly enshrined in any reapportionment by an affirmative decree of the District Court.

3. Secondly, as an alternative argument on this point, several of the appellees in No. 318 (Abe Br. 86-87; Cr. Br. 50) urge that the District Court's error in affirmatively upholding the constitutionality of the remaining provisions of the legislative apportionment Article was at most "harmless error" or that it was in effect "cured" through the Legislature's adoption of the Senate plan. In the first place, of course, this argument assumes that the District Court erred in rejecting the Legislature's Senate plan, a proposition which the appellees then seek to uphold, and which we, of course, dispute.

But even if the Senate plan had met constitutional tests, it does not follow that the District Court's action in affirmatively upholding the details of the existing scheme was harmless error. For, if it erred in narrowing the choices available to the Legislature (or to itself) in adopting a provisional plan, its erroneous action will have had a per-

manent effect on the structure of the reapportioned Hawaii Legislature; it must be remembered that any provisional plan will be the starting point for a permanent plan. If there is one thing which the briefs of the appellees make plain, it is that the Legislature in developing its Senate reapportionment plan was confined by the existing provisions of the House apportionment and the other features of Article III of the State's Constitution which the District Court affirmatively upheld in its February order. Had the Legislature not been so restricted, as we contend, through the erroneous action of the District Court, the plan which emerged might well have been entirely different. (See Opening Br., pp. 37-42)

Thus, even if the Legislature's Senate plan had been constitutional, the error of the District Court's February order obviously would not have been harmless error. It would have affected the entire subsequent course of events. It would have been a material factor in the determination to use one plan rather than another. If the District Court erred in affirmatively upholding in its February order the details of Article III apart from the numbers of Senators per district, the only relief that could ever be effective would be a remand by this Court, under appropriate general guidelines, which would leave the State free to adopt a provisional plan that might readjust any of the features of the apportionment system, in both houses, to the extent appropriate to reach not only a minimally constitutional but a sound and wise overall result. Any other course would be an unwarranted invasion by the courts of the functions which should be exercised in the first instance by the Hawaii State authorities.

B. The District Court Erred in Sanctioning the "Registered Voters" Measure of Representation in Hawaii.

1. On this issue, too, the briefs of the appellees in No. 318 do not uniformly state with precision the real issue before the Court. (See, *e.g.*, Cr. Br. 51-58; Pl. Br. 13-15) The issue is *not* whether a state may exclude military and military-dependent personnel, or certain classes of military personnel, from the apportionment measure—although our position on this question, to the extent it may be peripherally involved, is that the state may not, as taught by *Davis v. Mann*, 377 U.S. 678, 691 (1964).[7] The measure of apportionment used in the Hawaii House of Representatives—and in the Senate plan rejected on other grounds by the District Court—is, purely and simply, a "registered voters" measure. As such, it is completely different from a population measure: for one thing, it includes less than one-third of the people that a population measure would include. (R. 55) And, in any event, as we demonstrated in our opening brief (pp. 63-64), a "civilian population" measure does not produce results similar to the "registered voters" measure.[8] Thus, Hawaii's use of the "registered voters"

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[7] Thus the elaborate argument in the Cravalho Brief, Cr. Br. 51-58, likening the exclusions here to the exclusion of aliens from the apportionment base, totally misses the point. In 1960 there were about 202,000 registered voters of a total population of 633,000 in the State. (R. 55) More than "exclusion" in any meaningful sense is involved.

[8] The Cravalho Brief suggests that if the *districts* in which there are substantial military populations are omitted, there is a substantially constant ratio between "registered voters" and "civilian population." (Cr. Br. 56) But even doing so there is a deviation between a high of 48% and a low of 36%, or about one-fourth. And more fundamentally, the point is that the civilian population in the districts where there are many military personnel cannot be disregarded; what we examined in our opening brief in each district was the ratio between registered voters and *civilian population*.

measure must stand or fall in itself, without reference to any attempted justification from the arguments as to the significance of the presence of a substantial military population in the state.[9]

So eager are certain of the appellees in No. 318 to justify the "registered voters" measure simply on the basis of the substantial number of military installations in Hawaii, that they indulge in patently circular reasoning. Thus, the Abe brief argues that one of the reasons supporting a "registered voters" measure in Hawaii is the fact that it tends substantially to exclude the military population. (Abe Br. 101-02) The brief then proceeds to argue that this exclusion of military personnel does not amount to invidious discrimination against them (as condemned by *Davis* v. *Mann, supra*) because the state has adopted a uniform policy of following a "registered voters" measure. (Abe Br. 104-05) We submit that it is not permissible to justify the practical exclusion of military personnel from the apportionment base on the theory that "registered voters" is a permissible measure while at the same time justifying the use of the "registered voters" measure on the basis that it excludes the military.

2. Perhaps sensitive to this essentially circular nature of any argument in support of the "registered voters"

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[9] As we will touch on later, the provision for periodic reapportionment on a "registered voters" measure—contained both in the existing Hawaii Constitution provision as to the House and in the Legislature's Senate reapportionment proposal—likewise indicates that the "registered voters" measure must stand or fall in itself. As we developed in our opening brief (pp. 67-70), the District Court affirmatively upheld the constitutionality of this provision. Since there is no way of predicting what relationship "registered voters" will bear in the future either to total population or to some adjusted total population measure, the only issue before the Court is whether the "registered voters" measure is *per se* permissible.

measure on the justification that it excludes certain specific segments of the population, several of the appellees in No. 318 at times logically and frankly espouse the proposition—which to us is the only one which could with consistency be urged in support of Hawaii's "registered voters" measure—that "registered voters" is of itself a permissible measure of apportionment. Indeed, certain of the appellees take the next logical step and contend that "registered voters" is the only permissible measure of apportionment, and that total population is not, in itself, a permissible measure.

Thus, the Richardson brief states the issue most clearly: "We submit that just the opposite [from the Governor's contention] is true: That total population as a basis for apportionment is constitutionally permissible *only* when the use of total population results in an apportionment substantially equivalent to that which the use of registered voters would produce." (Ric. Br. 10) And, while not as frankly put, this is the essential point of certain arguments of the Abe brief. (Abe Br. 96-100)—Indeed, the Abe brief is ineluctably led to the point that a state might not constitutionally pattern its apportionment measure after that of the Federal House of Representatives, which is of course expressly based on census population. (Abe Br. 99-100) Census population, the Abe brief contends, is a permissible measure only in view of the express provisions to that effect in the Federal Constitution.

The whole underpinning of this argument--which would apparently call in question the apportionment systems of a majority of the states, unless the results obtained through them happened to coincide with that which would prevail under a "registered voters" measure—appears to be, in

essence, certain statements by this Court in its previous reapportionment cases. (See Abe Br. 96-98) Thus, for example, it is urged that the statements in *Wesberry* v. *Sanders,* 376 U.S. 1, 17 (1964)—itself a congressional districting case—to the effect that the essential basis on which reapportionment suits may be maintained in the federal courts is protection of the right to vote, indicate that the "registered voters" measure is the only permissible substantive standard. (Abe Br. 97-98; Ric. Br. 8-9)

Clearly, this is not the case. Certainly the number of voters was not the appropriate substantive standard in *Wesberry* itself, since the Federal Constitution expressly says that the measure of apportionment in the House of Representatives is to be population. Indeed, *Wesberry* is a proof of our position; for there this Court clearly said that unless congressional districts were apportioned on a population basis (376 U.S., at 9-14) there would be a dilution in the voting rights of the qualified voters of the various districts. *Id.,* at 7-8. The Court specifically said that: "We do not believe that the Framers of the Constitution intended to permit . . . vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants." *Id.,* at 8. Thus, the standard as to whether a qualified voter's vote is diluted is whether it is cast in a district against which there has been discrimination with respect to "numbers of inhabitants."

Similarly, as we have developed in our opening brief, the basic substantive test in a state legislative reapportionment case is that of equality of representation. To say that the basis of standing in a reapportionment case is protection of the right to vote from dilution only poses

the question what is the proper measure of apportionment. As we have developed in our opening brief, the proper measure of the right to vote for state legislators as well as for representatives in Congress is the right to vote in districts which are substantially equal in population; it is when that right is impaired—through a system of unequal representation of the people—that the right to vote is impaired. The substantive measure is the Fourteenth Amendment's Equal Protection Clause, which protects "any person within its [a State's] jurisdiction." "Registered voters" is no more the appropriate substantive measure here than it was in *Wesberry*.

3. It is no answer to urge, as do several of the appellees, that the loss of the right to vote for failure to meet reasonable conditions upon registration—such as literacy tests, residence or age requirements, or requirements for the taking of some affirmative action—is not prohibited by the Constitution. The issue is not whether it is proper to deny certain persons—such as illiterates, those having their domicile elsewhere, minors, and those who do not bother to register—the right to cast ballots. The question is whether it is proper, because of these factors, to exclude the district in which these persons reside from a representation in the State's Legislature based on its population. As we have developed extensively in our opening brief, these are entirely separate questions. Not only the person who neglects to register, but his neighbor who does register, is disadvantaged when representation is based on a "registered voters" measure. All people—children and adults, literate and illiterate, registered and unregistered—are consumers of governmental services and are members of the body politic. Basing representation on a "regis-

tered voters" measure destroys the fairness of a representation system and thus dilutes the voting rights, under this Court's reapportionment decisions, of those persons in the underrepresented districts who have the necessary standing, as voters, to bring a suit for redress.

4. To sum up: The demands of logic—and the express provisions of the Hawaii Constitution, which the District Court affirmatively upheld, and which appellees defend here, calling for continuing reapportionment on the express basis of "registered voters" [10]—have forced most of the appellees to defend, as they must, the Hawaii "registered voters" measure in its own terms, rather than as a substantial equivalent of a population-based measure. Indeed, the logic of their position requires—as a number of them argue—that the "registered voters" measure be considered the *only* acceptable measure under this Court's decisions, in any state, at any time. As such, the position of the appellees is patently unsound. It would make a measure of apportionment which is followed in only a small minority of the states the only constitutionally permissible approach.

It is thus beside the point to seek to uphold the "registered voters" measure on the basis that it substantially excludes the military. In the first place, exclusion of the military is not in itself permissible.[11] Even if it were, it

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[10] See note 9, *supra*.

[11] As we developed in our opening brief (p. 65 n. 29) many of the military personnel in Hawaii own their own homes and have lived in the state for over five years. Thus, it would not be permissible *per se* to eliminate the military on the ground that they were transients, even apart from the teachings of *Davis* v. *Mann*. Moreover, as we have demonstrated, even where there are shorter

does not happen to be the approach that Hawaii has adopted; it has adopted a "registered voters" measure. Neither in form nor in substance is this the same as a "civilian population" measure.

As we have urged in our opening brief, the starting point in any proper apportionment system must be total population. It may be possible to justify, under the Constitution, modifications of that standard designed to exclude aliens, transients or other similar groups.[12] Also, as a practical matter, where a system which is based on an impermissible standard produces the same result as a population-based system would produce, the results of the system—though not the system *per se*—may be upheld. But

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tours of duty of the military, there is still permanently present, as a factor substantially and directly affecting the economic, social and governmental life of Hawaii a permanent military establishment in the State, composed of a relatively stable number of people, though the individuals who compose that number may change more rapidly than those who comprise the population of a state where there are no military installations. Given the presence of this element of population in a state, it is required, we submit, that in distributing representation within the state the state do so on a basis which reflects this element.

[12] As we stated in our opening brief (p. 67), we do not mean to say that the State is without power to cope with extraordinary wartime or emergency situations, such as that dwelt on by the appellees, the situation in 1944 when Hawaii was a staging area for World War II. But once again, we reiterate, the starting premise must be population—not some other measure which is totally different and which starts from a base containing less than one-third of the total population.

The point that it is allegedly possible to construct a single-member district on a total population measure without any registered voters in it, by taking in certain military reservation areas exclusively (Abe Br. 103), is a diverting one, but the answer is that the problems raised by such a district may be dealt with if it is ever formed. It is, of course, quite feasible to construct equal-population single-member districts without creating any such situation.

Hawaii's "registered voters" system is wrong on each of these standards. It does not purport to be a population-based standard or an acceptable modification of one. It is based on a fundamentally different approach. Since the system of "registered voters" apportionment is expressly imbedded in the State Constitution, the system itself may not be upheld. Since the present results of that system do not coincide with a population-oriented approach, the present results of that system may not be upheld.—Thus, the District Court erred in upholding the "registered voters" measure of apportionment in the House of Representatives.[13]

C. The District Court Erred in Sanctioning the Arbitrary System of Random Single-Member and Multimember Districting in Use in the Hawaii House of Representatives.

On this point too, an immediate clarification of the issues will be valuable. Our position is not that a system of multimember districting is *per se* unconstitutional; nor could this be our position in the light of the decision of this Court in *Fortson* v. *Dorsey,* 379 U.S. 433 (1965). The appellees in No. 318 at great length develop the proposition that there are virtues in a multimember districting system just as there are virtues in a single-member district system, and that the Legislature may constitutionally choose one or the other. (Abe Br. 32-46; Cr. Br. 25-32; Pl. Br. 17-19) The point, however, is that in the system employed in the Hawaii House of Representatives—and in the plan for the Senate rejected by the District Court—multimember dis-

[13] Likewise, its action in rejecting the Senate reapportionment plan is justifiable on the alternative ground that that plan employed a "registered voters" measure.

tricts, involving varying numbers of members per district, and single-member districts, are combined in a completely arbitrary and random fashion. The arguments, based primarily on the writings of political scientists, made by the appellees in support of a multimember district system[14] essentially support a system in which each of the districts has the same number of representatives. Appellees have not produced any argument in favor of a system in which the various districts have varying numbers of representatives, and we know of none. This discrimination, then, "reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U.S. 186, 226 (1962).

The fact of the matter—as the appellees admit—is precisely that there are different political consequences attendant upon living in a single-member district or in a multimember district. One of them is that in a multimember district the individual is represented by a greater number of legislators and accordingly has a greater representational power than in a single-member district. If all the districts were represented by the same number of representatives, there would be no disparity in this regard. But in Hawaii this is not the case because the number of Representatives per district varies from one (in five out of eighteen cases) to six (in one case). It appears, then, that there are substantially different consequences of living in a multimember district and of living in a single-member district. What, then, is the basis on which it is determined whether a person will be represented by a single Representative or by a number of Representatives?—The answer is no more than the place of his residence. This is precisely

[14] See, in particular, Abe Br. 37-38; Pl. Br. 17-19.

the factor which this Court's decisions teach may not be employed as a factor. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 565-68 (1964).

Our contentions are as follows: We contend that the Hawaii House districting scheme is unconstitutional because it is completely arbitrary[15] and results in differing representation of different persons solely because they reside in different areas of Hawaii. We also contend that, because the districting in the proposed Senate plan is based on the arbitrary districting of the House, it is also arbitrary and intensifies the discriminations inherent in the House scheme.

We disagree with the Abe Brief's contentions that the validity of a varying-member districting system does not depend upon the arbitrariness of the district boundaries and that courts will protect only the right to mathematical equality of the weight of votes. (Abe Br. 47-48) Courts are not precluded from inquiring into aspects of equal representation other than adherence to the equal-proportions rule. Once it is shown that a state has arbitrarily and irrationally granted different types of representation to different persons according to their place of residence, a violation of the Equal Protection Clause is established.[16]

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[15] As we suggested in our opening brief (p. 72), a varying size districting arrangement might possibly be justified if the districts themselves were based on a uniform standard, such as the boundaries of existing political subdivisions. *Cf. Fortson* v. *Dorsey*, *supra*.

[16] Demonstrating how it has missed the entire point of the argument, the brief of one of the appellees (Abe Br. 115) analogizes the Hawaii situation to one of election at large throughout a state, which presumably presents no constitutional difficulties since it is sometimes used as a remedial measure in reapportionment suits. The point is that in an election at large—just as if a state were

1. ***The Arbitrariness of the Districting.***

We contend that there is no rational basis for the variations in size of the Hawaii House districts. The districts range in population from 5,030 persons to 95,118 persons, and the number of Representatives elected from each district ranges from one to six. (Opening Br., p. 10) Similarly, Senatorial Districts under the proposed Senate plan range in size from 12,266 registered voters in 1964 to 40,629 registered voters in 1964 and would be entitled to elect from one to four Senators. (Opening Br., p. 18)

No rational basis can be perceived from an examination of the distribution of the House districts throughout the state. Large multimember districts are contiguous to single-member districts. Four of the five districts in Hawaii County are single-member districts, while the fifth elects three Representatives. Of the two districts in Maui County, one is a single-member district, while the other elects four Representatives. The County of Kauai is a single district electing three Representatives. Of the ten Oahu districts, two elect two Representatives each, two elect three Representatives, five elect four Representatives, and one elects six Representatives.

The size and distribution of the districts cannot be justified by a determination to use a particular type of boundary line, since the lines used include a hodge-podge of the boundaries of basic areas and islands, mountain ranges,

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divided into districts of substantially equal population, each electing two members or four members or six members—each person elects the same number of legislators as does everyone else in the state. This is not the case with the system in the Hawaii House of Representatives; and the distinctions which it makes have not been supported on the basis of any rational system.

canals, valleys, and streets, the boundaries of land tracts, and historical, election, educational, judicial, and taxation boundaries. It is no answer to say, as appellees in No. 318 do, that the various lines which are drawn individually have some historical or geographical or physical significance. It would be hard to draw lines which did not have some such significance. The point is, on what basis are certain boundary lines used rather than others; and on what basis is the decision made to construct boundaries which will produce single-member districts in certain cases, two-member districts in others, three-member districts in others, four-member districts in still others, and in one case a six-member district?—The briefs of the appellees in No. 318 can be read indefinitely without disclosing any single uniform principle on which the boundaries of the districts were drawn—and hence the decision reached as to whether people living in a particular area would be represented by one, two, three, four or six legislators.

None of the rationales proposed for the House districting scheme justifies the use of districts of such varied sizes and their arbitrary distribution throughout the state:

(a) The Richardson Brief attempts to justify the districts by discussing the procedures of the 1950 Constitutional Convention which drafted the House districting. It describes the delegation of authority for districting to the convention representatives of each county and the varying thought processes leading to the different districting schemes in each county. This information, which was not before the District Court and for which no authority is cited, evidently is based on Mr. Richardson's memory. It is not a proper subject for judicial notice at this point in the proceedings. Mr. Richardson has not testified to the

truth of this information nor has he referred this Court to any source of the information.

In any event, the information does not justify the variations in size and the distribution of the districts. The Lieutenant Governor attempts to justify the differences among the counties by the statement that "Each island is different" (Ric. Br. 21) and by the implication that therefore the Convention left the job of districting them to representatives of the counties. However, the fact that each island is different is relevant only if it is shown that the difference has a rational relationship to the difference in districting. No such relationship is shown. In addition, the fact that representatives of each county determined its districting is irrelevant; political approval of a districting scheme, whether by a Constitutional Convention, by representatives of those discriminated against, or by a majority of those discriminated against themselves, does not validate an unconstitutional scheme. See *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964).[17]

And the mental processes of each group of representatives as described by Mr. Richardson do not in fact account

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[17] Indeed, to the extent it shows anything, the statements on this subject in the course of the Constitutional Convention prove the arbitrariness of the scheme. As Delegate Bryan put it:

> "We tried in districting to let the members from the various districts more or less decide what they wanted. For instance, on the island of Kauai, the representatives from the island of Kauai said they would rather have one district than to have three districts or four districts, so you notice that the island of Kauai is one district. The representatives from the fifth district said that they would like to have districts with approximately two or three, and as nearly uniform as we could make it. We have two for the three districts in rural fifth district and three for each of the three districts in urban fifth district." II *Proceedings of the Constitutional Convention of Hawaii*, p. 109.

for the differences in size and the random distribution of the various districts within each county. That Kauai was entitled to four of the fifty-one Representatives is not a reason for the use of a four-member district rather than four single-member districts. While it may have been rational for the representatives of Maui to create one single-member district embracing the islands of Molokai and Lanai, no reason appears for creating a five-member district on the island of Maui. That the island of Hawaii is large and has a varying economy is no reason to divide it into four single-member districts and one four-member district.

Appellee Richardson claims that the rural parts of Oahu were divided into Representative Districts on the basis of certain long-standing administrative districts. (Ric. Br. 23-24) To be sure, it does appear that the three rural Oahu districts, the Eighth, Ninth and Tenth Representative Districts, were formed from certain administrative districts which had been defined in Hawaii legislation.[18] But this is only further proof of the hodge-podge of districting created for the Hawaii House of Representatives. These administrative districts were not followed in setting up Representative Districts in the remainder of Oahu; and, although the same section of the statutes which provides for them also divides the other islands into administrative districts, these districts were not followed consistently in dividing the counties of Hawaii, Maui and Kauai into Representative

[18] The statutory provisions for these administrative districts—which presently are of importance only for purposes of defining the jurisdiction of the local district courts in the state (courts of limited jurisdiction, like a Justice of the Peace court)—are presently codified in Section 10-1, Revised Laws of Hawaii 1955, as amended.

Districts. Thus, the County of Hawaii, with nine administrative districts, was divided into five Representative Districts, four of them being single-member and the fifth a four-member district; the County of Maui, with seven administrative districts, was divided into two Representative Districts, one a single-member and the other a five-member district; the County of Kauai, which consisted of five administrative districts, became one Representative District with four members. The absence of any consistent policy is obvious.

The Richardson Brief (Ric. Br. 24-26) contends that as to the Representative Districts within the urban areas of Oahu County—the City of Honolulu—the Constitutional Convention adhered as nearly as possible to the ancient land districts known as ahupuaas. The boundaries of the Eleventh through the Seventeenth Representative Districts are sought to be justified in this manner. But there is no record whatsoever of what the boundaries of the ahupuaas within the urban areas of Honolulu are. It is incorrect therefore to state or imply that the Honolulu Representative Districts followed ahupuaa boundaries. Furthermore, there is no evidence, and Mr. Richardson fails to point out any, in support of his assertion that the members of the convention intended to draw the lines of those districts based on the concept of an ideal ahupuaa, running from the mountains to the sea. In any event, whatever rationality such districting may have had in feudal and agrarian Hawaii in providing the chief of an ahupuaa and his followers with seafood, lowland vegetation and mountain timber, it bears no rational relation either to modern urban conditions or to the end of legislative districting, the provision of equality of representation.

Contrary to a further suggestion of this appellee, most of the Representative Districts in Honolulu do not cover only a single area or neighborhood. For example, the Fourteenth, which he describes as Pauoa, includes one-half of Nuuanu, Punchbowl and Kakaako, as well as Pauoa; the Fifteenth, which he describes as Manoa, also includes Makiki, Moiliili, McCully, St. Louis Heights and Waikiki; the Sixteenth, which he describes as Kaimuki, also includes Palolo, Kapahulu and Diamond Head; the Seventeenth, which he describes as Wilhelmina Rise, also includes a portion of Kaimuki, Maunalani Heights, Waialae, Kahala, Aina Haina and several other districts. Each of the areas we have named is a quite distinct area of substantial size. Thus these Representative District boundaries cannot be explained as encompassing separate established areas.

(b) The Abe Brief attempts to justify the districting on the basis of the number of Representatives apportioned to Oahu. (Abe Br. 111-12) The relationship between a decision to apportion thirty-three Representatives to Oahu and a decision to create varied multimember districts is obscure. Certainly thirty-three single-member districts could easily have been drawn in this area of great population concentration, having almost five-sixths of Hawaii's 1960 population. (See Opening Br., p. 75)

This brief also suggests that the districting scheme reduces the possibilities of partisan gerrymandering. (Abe Br. 114) But whether or not fixing district lines and the number of Representatives prevents future gerrymandering, the fear of gerrymandering has no relationship to the extreme variations in size of the districts. The districts

varied in size when they were established. Their differences cannot be justified by population shifts since that time. This "justification" is a patent afterthought.

(c) Both the Abe Brief and the Cravalho Brief refer to general policies which are furthered by multimember as opposed to single-member districts. (Abe Br. 112, 35-46; Cr. Br. 31-35) However, these policies are irrelevant to the present issue. The issue is not the rationality of multimember districting in general. It is the rationality of the random use of districts greatly varying in size. The policy of reflecting state-wide rather than local views in the Legislature, for instance, does not support districting in which five districts, being single-member, reflect local views (under the appellees' assumptions) while the other thirteen reflect gradually broader views depending upon whether they are of a size entitling them to two Representatives or to six. (See Abe Br. 38-40.) Similarly, a policy in favor of establishing a strong two-party political system through large districts cannot justify a system containing districts of greatly varying size. (Abe Br. 40) Other rationales of the appellees which are fallacious for this reason include the "law of large numbers," the benefits to be gained through use of heterogeneous districts, and the insulation of legislators from pressure groups. They simply do not explain the completely arbitrary distribution of the single-member districts and the varying multimember districts.

(d) Perhaps the most revealing attempt to justify the multimember districts is the argument in the Cravalho Brief, relating to the large multimember districts on Oahu proposed by the Senate plan. (Cr. Br. 32) There it is argued that because the Senate must now be apportioned

according to population and thus the rural areas of Hawaii will lose their overrepresentation, the new urban Senators should be elected from larger districts than rural Senators in order to ensure their state-wide viewpoint. Thus, while rural interests are considered valuable local interests which should be preserved, urban interest groups are to be submerged in large districts, doubtless to ensure that urban Senators recognize rural problems. Such an attempt to justify the districting scheme, flying as it does in the face of this Court's decisions on the irrelevance of geography in representation, illustrates the impossibility of rationalizing the two districting schemes.

Thus, no rational basis for Hawaii's "crazy-quilt" districting has been suggested. This fact is the best indication that the burden of proving arbitrariness was fully carried before the District Court.

2. *Overrepresentation of the Large Multimember Districts.*

That the method of equal proportions has been complied with in the districting[19] does not minimize the discrimination against those residing in single-member or small multimember districts. Those who live in large multimember districts are represented in the Legislature by a larger number of legislators and do therefore have a greater opportunity to influence legislative decision-making. As we have demonstrated, there is no rational basis for these distinctions.

To disprove the discriminatory effect of these distinctions, the appellees in No. 318 argue that numerous repre-

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[19] As repeatedly pointed out by appellees, see, *e.g.*, Abe Br. 55, 58-59, 113.

sentatives may not represent an individual any better than one representative. (See, *e.g.*, Abe Br. 56) But this is clearly beside the point. For instance, in considering an apportionment scheme in which the equal-population principle is ignored, a court could not hold that the apportionment was constitutional because in fact a legislator from an underrepresented area happened to be a more efficient or powerful individual in the legislature than his colleague from an overrepresented area.

It is also argued that legislators from multimember districts are not necessarily more responsive to their constituencies than legislators from single-member districts. (See, *e.g.*, Abe Br. 54-57) While this may be true, unless each legislator from a six-member district was only one-sixth as responsive to each constituent as a legislator from a single-member district there would not be equality of representation. Certainly it cannot be assumed that multimember district representatives are this unresponsive to their constituents. The net effect is that constituents in multimember districts do have proportionately more representation than constituents in single-member districts.

3. *Submergence of Minorities Within the Large Multimember Districts.*

On this issue also, the appellees in No. 318 make the mistake of assuming that proof of actual underrepresentation of a specific individual is necessary to establish a violation of the Equal Protection Clause. They argue that proof that districting is arbitrary and that districts vary greatly in size plus proof that large multimember districts are highly heterogeneous is insufficient to prove submergence of minority groups. But we are not asking, as the Abe Brief suggests (Abe Br. 64-74), that each minority group in

Hawaii be identified and represented in the Hawaii Legislature. Rather, we are asking that persons be treated equally no matter where they live in the State.[20] If all districts in the state were equal in size, minority groups would risk submergence equally. However, if one district is six times larger than another, it is obvious that groups of persons in the large district who would be represented if the district were divided into six districts might not be represented.

The arguments of the legislator appellees in No. 318 concede that the larger the district the less likely that minority interests will be represented. They argue that a policy decision that legislators should have broad, state-wide interests led to establishing large districts. This is tantamount to an admission that the effect of creating large districts is to submerge local interests and minority groups. If this policy had been followed uniformly throughout the state resulting in creation of districts of uniform size, discrimination against specific minority groups might have to be shown, to demonstrate the invalidity of the system.

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[20] Accordingly, the repeated insistence in the Cravalho brief on the proposition that a state may not constitutionally set up racial enclaves for voting purposes misses the point. (Cr. Br. 38-42) Our argument, as we indicated in our opening brief (p. 80 n. 11), is not that the districting in Hawaii should give a particular voice to any particular race. Our point is that there are minority groups in Hawaii, racial and otherwise; that minorities—whoever they may be on a particular issue—tend to be submerged in the large multimember districts; and that no rational basis has been shown as to why certain areas of the State should be parts of large multimember districts and others parts of single-member or smaller multimember districts. It is this arbitrariness—which happens to have the consequences specified upon minorities in the large multimember districts—of which we complain.

However, since some districts are small and some are large, it is obvious that the policy was applied arbitrarily and that members of minorities are treated differently according to their place of residence. Once again, place of residence is not a valid basis for discrimination. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 565-68 (1964).

Therefore, the argument that minorities may constitutionally be submerged by a determination to establish districts of 10,000 persons each rather than districts of 1,000 persons each is irrelevant. In those situations persons throughout the state are treated equally and a policy decision concerning the type of representative government to be established has been made and uniformly applied. The very point of our argument is that this is not the case as to the Hawaii House of Representatives.

II. THE DISTRICT COURT'S APRIL ORDER CORRECTLY DECLINED TO APPROVE THE LEGISLATURE'S PROPOSED REAPPORTIONMENT PLAN FOR THE SENATE

Many of the arguments of appellants in Nos. 323 and 409 have been answered in previous sections of this Reply Brief or are adequately dealt with in our Opening Brief. All of our discussion of the unconstitutionality of the House random multimember districting system is relevant here, and we shall now briefly address ourselves to certain specifics of the Senate random multimember districting system.

The appellants argue that the District Court erroneously placed the burden of justifying the proposed Senate plan on the legislators who developed it. Instead, they assert, the District Court should have presumed that the plan was

valid until any possible justification for it had been disproved.[21] (Abe Br. 20-26; Cr. Br. 27)

The context in which the District Court considered the plan is highly relevant to this issue. The District Court and all the parties, including the legislator-appellants, agreed that the Hawaii Senate apportionment violated the Equal Protection Clause. Originally, the District Court forbade the Legislature to enact a reapportionment statute or to propose a constitutional amendment respecting the Senate apportionment because of doubts as to the Legislature's power to reapportion itself by statute and because of what the court deemed the slowness with which the Legislature had acted in its consideration of reapportionment. (R. 78, 80; 238 F. Supp., at 478-79) However, on assurances by the Legislature that it was about to agree upon reapportionment, the District Court held that the Legislature might enact a provisional plan subject to District Court approval and might initiate a constitutional amendment concerning reapportionment. (R. 88-91)

Later, the District Court learned that the Legislature was considering a plan in which Oahu was to be divided into two districts, one electing nine Senators and the other electing ten Senators. The court, in an informal memorandum sent to the Legislature, indicated that it believed that single-member districts were preferable to multimember districts in the Senate, and that it would approve two-member districts "if and only if the legislature can affirmatively show

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[21] It is urged that the District Court was inconsistent in requiring plaintiffs to bear the burden of proof as to the House's invalidity, but requiring the Legislature to support the Senate provisional plan. (Abe Br. 25)

substantial reasons therefor." (Opening Br., App. B, p. 28a.) Despite this admonition, the Legislature adopted a plan consisting of one single-member district, one two-member district, two three-member districts, and four four-member districts.

The plan was approved by the Senate which all parties had agreed was unconstitutionally apportioned. Although the plan was approved by a majority vote in each house of the Legislature, its effectiveness was expressly made dependent upon approval by the District Court. (R. 117)

In this context, the legislators who considered the plan were in large part parties to the present lawsuit, devising a plan, with the permission of the court, to remedy the unconstitutional apportionment scheme under which they had been elected. It was expressly provided that the provisional plan would not become effective until the District Court approved it. The plan was not adopted in the manner provided in the Hawaii Constitution for the adoption of constitutional amendments. The plan thus devised was not entitled to the traditional deference given to state legislation enacted in the ordinary fashion which becomes effective upon passage by the legislature.[22] The District Court had the power in this situation to require the legislators to justify the constitutionality of their plan just as it would have the power to require any party to justify the constitutionality of a remedial decree the party proposed to the court.

The court also had the power, as pointed out in our opening brief, to require the legislators to justify the wisdom

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[22] Contrast *Fortson* v. *Dorsey*, *supra*, where the attack was on a provision already subsisting and in effect.

and effectiveness of the plan as a remedy for previous malapportionment.[23] The plan's use of multimember districts was highly defective in insuring dissipation of the effects of previous malapportionment, and even if these defects had not made the plan unconstitutional, as we argue they had, the District Court could have disapproved the plan in its discretion. For instance, the Cravalho Brief argues that the plan's random multimember districting scheme was justified because it would force Oahu Senators to hold statewide interests. (Cr. Br. 32) The Brief suggests that, because rural areas would lose their majority in the Senate under a constitutional apportionment, it was permissible to create urban districts with much greater populations than rural districts so that urban Senators would have a broad viewpoint. This is an admission that areas with previous underrepresentation were not to be allowed full expression of their individual views under the proposed plan. Certainly such a plan would not tend to dissipate the effects of earlier malapportionment.

Moreover, there was sufficient proof for the District Court to find that the proposed Senate plan violated the Equal Protection Clause even if all possible justifications for the plan are to be presumed. As pointed out in our discussion of the House districting scheme, that scheme was arbitrary and irrational. The proposed Senate plan also arbitrarily and at random created districts of greatly varying size, for which no adequate justification has been

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[23] Certainly the legislators had ample notice of the burden on them. The court had warned that any deviation from single-member districting would have to be justified. That Senators who depended on an unconstitutional apportionment for retention of their seats had helped to devise the plan was another reason for the court to require a justification of the plan.

suggested by the appellants in Nos. 323 and 409. The District Court, on the basis of uncontroverted evidence, found the existence of this variation in size. The District Court found, on the basis of substantial evidence, that the proposed Senate districts were based on present Representative District lines and that two of the eight proposed Senate Districts were coterminous or virtually coterminous wtih Representative Districts. The Senate districting is thus at least as arbitrary as the House districting. The attempts of appellants in Nos. 323 and 409 to justify the Senate Districts because of their relationship with the House Districts have the effect only of supporting the District Court's findings.

The appellants' other suggested rationales for the plan fail to explain the variation in size of the districts and the resulting different treatment of persons according to where they reside. The only exception to this is the argument in the Cravalho Brief that local rural interests, but not local urban interests, should be represented in the Legislature. (Cr. Br. 32)

The arbitrariness of the plan is underscored by the obvious discriminations the districting would cause. The District Court found, on the basis of uncontroverted evidence, that some of the large multimember House Districts contained highly heterogeneous populations. When joined with other House Districts to form Senate Districts, the populations become even more heterogeneous. The District Court also rightly focused its attention on the large multimember districts in the proposed Senate plan which had the same, or substantially similar, boundaries to those of existing Representative Districts. It demonstrated that the proposed Sixth Senatorial District, which had virtually the same

boundaries as the existing Fifteenth Representative District, the largest Representative District in the State, was an irrational conglomeration, including a number of completely disparate areas in terms of population classifications. (R. 157, 270-72, 329)

Thus, the minorities in House Districts which would be coterminous with Senate Districts would obviously never have an opportunity for representation, while the majorities would dominate a large percentage of the Legislature. The District Court properly found that minorities in the large multimember districts would be submerged and that majorities would be overrepresented. (See subpart C, part I, *supra.*) In the light of the arbitrary and random character of the construction of the districts, this violated the Equal Protection Clause.

True, equality of population[24] among districts is fundamental. Yet, as correctly pointed out by the court below, districting proportioned to population may still deny fair, effective and equal representation to the people, absent a totality of consideration of such other important factors as "community of interests, community of problems, socio-economic status, political and racial factors" in creating districts and absent a consideration of the interrelation of all districts one to the other, and the interrelation of representation in one house to that in the other, to achieve "substantial equality of meaningful representation to each and all of the voters of the State." This is particularly true in the State of Hawaii and in the City and County of Honolulu which contains about 80 per cent of the population (R. 339),

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[24] Once again, we note that the Senate plan did not provide even this, based as it was on the "registered voters" measure.

where the habitable area is small but includes a highly divergent populace. As the court below correctly concluded, there was no totality of consideration of these factors, and the Legislature, whether innocently or designedly, failed to provide equity in representation.[25] (R. 161; 240 F. Supp., at 730)

CONCLUSION

For the reasons stated in our opening brief and this Reply Brief, paragraphs 1, 2, 3 and 4 of the decision and order of the District Court dated February 17, 1965, should be reversed, except insofar as they invalidated the provisions of Article III, Section 2, of the Hawaii State Constitution fixing the number of Senators per Senatorial District and the provisions of Article XV, Section 2, of that Constitution pertaining to constitutional amendments affecting representation in the Senate; and the decision and order of the District Court dated April 28, 1965, insofar as

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[25] A few words about what the District Court did *not* do by its April 28, 1965, decision are necessary because of certain imputations advanced by appellants in No. 323 and No. 409. The Cravalho Brief asserts that the court was requiring segregation of races into separate legislative districts. (Cr. Br. 38-42) The Abe Brief asserts that the court below was mandating that all districts be homogeneous in composition. (Abe Br. 63-74)

Of course, the court did no such thing. As our discussion makes clear, the court's censure was directed toward the Legislature's utter failure, in creating the kind of random multimember districting that it did, to consider the totality of all of the factors—community of interests and of problems, socio-economic, political and ethnic factors, as well as the basic factor of population equality—especially in view of the obviously highly conglomerate composition of the populace; and toward the Legislature's failure to consider the interrelation of the districts to each other and the interrelation of representation in the House to that in the Senate.

it rejected the Legislature's proposed Senate plan, should be affirmed.

Respectfully submitted,

BERT T. KOBAYASHI
Attorney General
State of Hawaii

BERTRAM T. KANBARA
NOBUKI KAMIDA
Deputy Attorneys General
State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

THURMAN ARNOLD
DENNIS G. LYONS
JOHN T. RIGBY
BROOKSLEY ELIZABETH LANDAU
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for John A. Burns,
Governor of the State of Hawaii

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

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